IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-827

HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,

Petitioners,

—v.—

TRANS WORLD AIRLINES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR RESPONDENT IN RESPONSE TO REPLY BRIEF

TWA submits this short rejoinder with the hope that it will assist this Court in considering the reformulation of issues contained in defendants' Reply Brief.

A. It is central to this case that the only facts which have been judicially established in the usual manner are (a) the procedural facts, as to which there is a complete record supporting the findings of the courts below, and (b) the facts as to TWA's damages, which have been established by findings made on the basis of a full, contested evidentiary hearing.

The remaining facts, those on which liability depends, are those which were alleged in TWA's complaint. With respect to them the customary apparatus of findings based on record evidence tested by cross-examination is missing.

It is missing because (as the lower courts found—a procedural fact) defendants prevented, deliberately and with knowledge of the consequences, trial as well as pretrial of the disputed fact issues. Having so found, the lower courts held that TWA's contentions as to these disputed fact issues, set forth in the complaint, must be taken as true. (TWA's main brief in No. 71-827, p. 75).

Speculation as to the facts which might have been established at a trial is permissible only to the extent that it is consistent with the framework established by the factual allegations of the complaint. As long as the possibility is demonstrably present that TWA could have proved a state of facts under and consistent with the complaint which would have established liability, defendants cannot secure a disguised and belated summary judgment in their favor by requiring TWA without discovery to prove, as a condition of recovery, those details which at a trial would have established defendants' unlawful conduct. A contrary rule would make a mockery of the system of pleading and discovery which this Court has established for civil actions.

Yet defendants' entire posture before this Court depends upon the unsound assumption that the effect of the default is to preserve and protect their factual contentions, while putting TWA to its proof.*

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* Defendants largely ignore the record except for an extended footnote (Reply Brief, pp. 2n.-3n.) purporting to correct "illustrations" of TWA's "misstatements" of fact. The "illustrations" themselves refute the charges made.

1. It is a fact that the "Rule 16" proceeding suggested by Special Master Rankin would have required TWA to specify all the facts it contended support its allegations in the complaint, to name each witness it proposed to call in support of each allegation and to state the substance of each witness's testimony—all before TWA had taken a single deposition (A-2387-88).

2. It is a fact that defendants never produced the so-called "tax documents" despite repeated orders in January and February of

Thus, when they state the "starkly simple substantive issue," the core of the statement—assumed throughout the remainder of the argument—is that nothing defendants did involved anything more than "normal business decisions" by a parent buying equipment for its subsidiary (Reply Brief, p. 3). That view of defendants' conduct is contrary to the allegations of the complaint, and to the evidence available in the record in this defaulted case (see TWA's main brief, pp. 40-56, *esp.* pp. 49-50).

1963 to do so (A-133-42, A-254, A-304-06). A reservation of ruling the previous spring is strikingly irrelevant.

3. The extent of the personal reservations of counsel for Toolco as to the $5 million estimate of the cost of the Hughes deposition is apparent not only from his comment at the time that "I resisted the figure that they came up with, and I am trying to get a further idea of how they arrived at that figure * * *" (A-280), but also from his reversion two years later in the submissions to this Court on the last appeal to the original lower, but equally unexplained, figure of $1 million (see Petition for Certiorari in No. 501, October Term 1964, p. 44). The $5 million figure was never mentioned again, from February 8, 1963 until defendants' latest petition was filed.

4. The court of appeals below expressly rejected defendants' position after defendants in that court made the same argument they now make that TWA had misstated the evidence with respect to the significance of defendants' interests in the Constellations and the HK-1 plywood flying boat (449 F.2d at 62, A-2768). The CAB "findings" are actually recitals based on information provided by defendants in non-adversary proceedings.

5. The comment on Connelly's testimony fails to mention that Connelly was testifying to what Boeing had been "given to understand" by defendants (A-1181). The important point is that defendants, as a practical matter, were able to control the disposition of the aircraft.

6. As to *Allied Air Freight, Inc.* v. *Pan American World Airways, Inc.*, 393 F.2d 441 (2d Cir. 1968), we find defendants' comments pointless. The case does not support the rather ambiguous reasoning which defendants base on it at pp. 30-31 of their principal brief, for the precise reason given in our statement. Unlike defendants, Allied at no time disobeyed orders of the court. The case in fact directly supports the decision of the court below that the asserted affirmative defenses in the instant case were insufficient to justify either a dismissal or a stay.

At p. 4 they deny that any supplier was excluded from the TWA market, or that there was any restraint on trade of suppliers, an assertion repeated at p. 18 and elucidated in a footnote on p. 6 by the statement: "Sales lost to TWA were replaced by sales to Toolco." But the specific preclusion of TWA from buying aircraft directly from non-Toolco suppliers resulted in TWA actually getting not only later but fewer aircraft than it would have obtained if it had placed its own orders with the manufacturers; the result of this restraint on the trade of suppliers was that they sold fewer aircraft in the aggregate. Pan American, for example, would certainly have purchased other aircraft from Boeing or Douglas if it had not acquired from Toolco six of the Boeings TWA had counted on, and TWA's damage case was expressly based on that premise. (See, *e.g.*, AX-118; Brownell Report, p. 64; A-1966). Toolco is known to have paid several million dollars to Convair in settlement of Convair's claim that Toolco's tactics disrupted Convair's business (DX 145; Doc. 554, p. 2946).

At p. 5 defendants state as a fact that Toolco was neither a manufacturer of aircraft nor a supplier of aircraft to airlines generally. The fact is that it was certainly such a supplier, actively engaged in the business for many years. And it took so many known steps toward manufacture (see TWA's main brief at pp. 42-44, 47-49), that if it was not technically a manufacturer during the years in question, it was plainly holding itself poised and ready to commence manufacture whenever a favorable opportunity developed.

At p. 7, in a footnote, defendants deny having profited from supplying jets to Pan American and Northeast. They do not cite, or refer to, or explain the profits of over $2 million from these transactions set out in their tax returns,

reported as capital gains and presumably taxed as such. Toolco's 1960 audited financial statement and tax return (Doc. 495) are clear, for example, that a *capital gain* (not a "credit" or refund of moneys previously paid) in the amount of $1,208,424 was realized from the Convair transaction (see TWA's main brief, p. 52 n. 21). These papers were sealed, at defendants' request, and defendants thereafter explicitly refused to make further discovery with respect to them (A-304-05).

The body of facts established by the allegations of the complaint and as the legal consequence of their default is what defendants dismiss as "procedural underbrush." They therefore concede nothing as established by the complaint alone; in their view, TWA, to recover, must depend on facts "established at the damage hearing" (Reply Brief, p. 15). These arguments were, of course, rejected below, Judge Metzner observing that "the shoe is on the other foot" (A-423), and Judge Kaufman that "this argument stands the matter on its head" (449 F.2d at 63, A-2759). As the court of appeals has pointed out, defendants never once offered to remedy their default in any respect (449 F.2d at 62, 78-79, A-2756, A-2792).

B. The legal propositions defendants advance as "substantive" defenses are extraordinary, by any standard. For the most part, the "substantive" defense is simply that Toolco owned a controlling interest in TWA's stock (46% in the early years, enhanced to 73% in 1955 and 1956 when TWA was prevented from ordering jets elsewhere and from arranging for their financing, and to 78% when this suit was brought). Defendants assert that the mere existence of this "parent-subsidiary relationship" necessarily means that TWA had "no claim to economic independence" (p. 4) and "no right to economic independence" (p. 5), and that Toolco and TWA must be treated for all

purposes as if the two were a "single entity" (p. 21), so that TWA's 13,000 independent shareholders are, as a matter of law, precluded from derivative actions based on antitrust claims (p. 5n).* But TWA is not only a technically distinct corporation; it is a major enterprise of independent origin, engaged in a public service business. Indeed, as one of the nation's great airlines it constitutes in its own right a separate and distinct market for flight equipment. There is no authority whatever to sustain defendants' proposition that tie-in arrangements, exclusive dealing arrangements and attempts to monopolize of the kind alleged in the complaint and recognized by the courts below could be licensed by the prior purchase of a majority of TWA's stock.

Defendants' assertion that antitrust immunity resulted from various CAB orders is also now reduced to a restatement of their parent-subsidiary immunity claim—that orders approving acquisitions of control of TWA by Toolco necessarily made the two corporations a "single entity" for all purposes under the antitrust laws. Defendants' own hypothetical example of a Lockheed acquisition, now elaborately restated (pp. 23-24), is its own *reductio ad absurdum*. They postulate an investment in TWA by Lockheed that the CAB approves as an acquisition of control, solely to save TWA from bankruptcy. From that defendants argue that the CAB's powers "would be crippled, and the statutory immunity for § 408 orders in effect written off of the books" (p. 24), unless thereafter Lockheed was free to monopolize the TWA market for aircraft, deal with TWA as a captive market and subject TWA to tie-in sales, exclusive dealing and forced boycotting of all

* It may not be without pertinence that, if the defendants' argument had any validity, it would be equally applicable to preclude an action for an injunction brought by the United States.

other aircraft manufacturers. Neither Congress in adopting the Act nor any court has ever suggested that such a result would or ought to follow an acquisition of control. The CAB will have no part of any such argument (see Amicus Brief, pp. 10, 11, 12-13, 18). The suggestion that a license to monopolize aircraft supply is necessary to attract investment in airlines is an economic travesty, disproved by Toolco's own experience in selling its 78% interest in TWA to the public at a profit of $450 million.

C. Defendants put forward as a new argument that any injury suffered by TWA as a result of defendants' activities did not arise from "the anticompetitive impact" of these activities. This argument depends upon an out-of-context use of the language in the recent decision of the Second Circuit in *GAF Corp. v. Circle Floor Co., Inc.*, —— F.2d ——, CCH 1972 Trade Cas. ¶ 74,075 (2d Cir. 1972). The argument is that an antitrust plaintiff cannot recover unless his damages were "the economic result of the anticompetitive effects of the alleged violations," and that TWA's damages were not the result of such anticompetitive effects.

The *GAF* case—the latest of a number of Second Circuit decisions on "standing to sue" (see TWA's main brief, pp. 200-02)—in no way conflicts with that Circuit's decision in the instant case. It would be surprising if it did, since Judge Hays, who wrote the opinion in *GAF*, was a member of each of the two unanimous panels that have decided against defendants' arguments in this case, per Chief Judge Lumbard in 1964, and per Judge Kaufman in 1971. Plaintiff GAF had complained of commercial pressures brought on it in an attempt to acquire control over it, which acquisition would violate the law. The anticompetitive effects of such an acquisition would have been felt, according to the court, not by GAF, whose ability to

compete would not be lessened, but by competitors. Hence the damages sought were not the result of an "anticompetitive impact" of the allegedly unlawful activities.

But there is no way in which defendants can pretend that TWA did not suffer anticompetitive impacts. TWA alleged and proved diminution of its competitive position resulting directly from defendants' antitrust violations (*e.g.*, Complaint, pars. 49(f), 50, 51, 52(a)(e), 53(h), A-23-26).

When, for example, defendants refused to deal at all with Boeing at the beginning of 1955 unless Boeing would sell Toolco the first 50 jets it produced (A-1023, A-1051, A-1208), Boeing was of course affected competitively. Had it acceded, it would have been worse affected, since that would have established Toolco as the exclusive supplier of such jets to the industry for nearly the first two years of the jet era. The impact on TWA, however, was disastrous. The boycott of Boeing was imposed during most of 1955, and it was a direct cause of the delay in TWA's receiving even those jets which it was ultimately allotted by Toolco. The diversion of jets from TWA to its competitors resulted in lost sales by the manufacturers (p. 4 *supra*); it also meant that TWA was directly deprived of the equipment which it needed in order to compete for traffic (see, *e.g.*, Brownell Report, p. 80, A-1966). The damages awarded to TWA consisted of the amount of its net losses of operating revenue resulting from this equipment deprivation, together with the extra cost imposed on it for the Boeings it did receive but was required to lease on a day-to-day basis from Toolco.

Aircraft manufacturers and other suppliers foreclosed from the TWA market were thus injured by defendants' conduct, but TWA, like the plaintiff in *Perkins* v. *Standard*

Oil Co., 395 U.S. 642, 649-50 (1969), was "no mere innocent bystander; [it] was the principal victim * * *." Defendants' argument that recovery for their antitrust violations was available only to the other suppliers of jets which were foreclosed from the TWA market, no matter what injury TWA suffered, is untenable against this background. Were defendants correct, the plaintiff builder in *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495 (1969), would have been automatically out of court since—under defendants' approach—the "anticompetitive impact" of the unlawful tying agreement there would fall only upon competing sellers of pre-fabricated houses. Similarly, the news dealer plaintiffs in *Bales* v. *Kansas City Star Co.*, 336 F.2d 439 (8th Cir. 1964), would have had no damage claim for being foreclosed from selling any publication except defendant's newspapers; only competing publishers of excluded newspapers and magazines would be hurt. *See also Osborn* v. *Sinclair Refining Co.*, 286 F.2d 832 (4th Cir. 1960), *cert. denied*, 366 U.S. 963 (1961).

After the 2-year damage hearing, the courts below were satisfied that but for the anticompetitive conduct alleged TWA would have acquired a 63-plane jet fleet at the times specified, and that it was fully entitled to recover for the ascertainable effects on its revenues, as reflected in the damage award.

Respectfully submitted,

DUDLEY B. TENNEY
80 Pine Street
New York, New York 10005
Counsel for Respondent
Trans World Airlines, Inc.